THE CONSERVATION OF WATER-POWERS.

"CONSERVATION" is a much used, a much abused, term. In its name, many salutary reforms have been advocated; some have been accomplished. In its name, also, have been committed many sins, both of commission and of omission. Some men who arrogate to themselves the title of "conservationists" are indictable under the charge of misbranding. Many, whose views are attacked as antagonistic to public interest, as selfish and non-progressive and as hostile to the policy of conservation, are, nevertheless, sane and discriminating advocates of a wise public policy.

The question of conservation, as the term is here used, has to do with the policy, not only of the governments, federal and state, but also of the people at large, with regard to those resources, useful to man, which are supplied by nature in a form easily adaptable to immediate utilization, and particularly with regard to those natural resources, not uniformly distributed, which are limited in extent or in quantity. Among such natural resources are the minerals in the earth, the forests growing upon the earth, and the waters flowing over the earth. Whether applied to any or all of these, a policy of conservation should, manifestly, be directed neither to a locking up or withdrawal from use, on the one hand, nor to an indiscriminate or wasteful utilization, upon the other hand. Economy, in its best sense, should prevail, but an economy which has regard for both the present and the coming generations. These natural resources are placed by nature for the use of man, the man of to-day and the man of the future. Where present and future interests conflict, those of the present are paramount. It is not justifiable unduly to place burdens and restrictions upon the present generation out of regard for those to come after us, nor unduly, by present extravagance, to impose unnecessary burdens upon the future. More than that, neither desires for the present nor for the future should be made the justification or pretext for measures in conflict with the fundamental laws of personal and property rights which are, under our constitutional government, the safeguards of our free institutions.

Conservation, then, should denote the policy of the economical utilization of these natural resources, and of the utmost protection, within the law, of such economy, consistent with the needs of present and of future generations.

Importance of Water-Power Conservation.

The two great, natural sources of energy available are coal deposits and water-powers.[1] The total stationary power used in the United States is estimated at over thirty million horse-powers.[2] The total developed water power is about six million horse-powers; and of the latter, about three-quarters is commercial power, that is, power produced for sale. The amount of water power now economically capable of development is not less than twenty-five million horse-powers, including that already developed,[3] and is by some authorities estimated as high as thirty-five million horse-powers.[4] The total potential water power of the United States is estimated at two hundred million horse-powers.[5] The present annual coal consumption in the United States is over five hundred million tons, and at the present rate of consumption and annual increase, the supply of anthracite coal will be exhausted before the end of the present century. The known supply of bituminous coal, while sufficient for six or seven centuries to come, assuming that the present rate of consumption continues, is in fact limited, and its cost to the consumer gradually increases as the supply diminishes.[6] While the cost of developing water power and the hazards of the business are great, the development of electrical transmission of energy has made water-power development feasible as a business proposition, as against the cost of steam power, to

[1] For the purpose of this discussion, gas and oil are assumed as part of coal deposits.

[2] See the report of the United States Commissioner of Corporations on "Water-Power Development in the United States," issued by the Department of Commerce and Labor, March 14, 1912.

[3] Report of Commissioner of Corporations, *supra*; Hearings on the Development and Control of Water Power, Senate Document 274, 62d Congress, 2d Session, pp. 11, 14, 211, 273.

[4] Senate Document 274, 62d Congress, 2d Session, pp. 11, 14, 32, 211, 272.

[5] Senate Document 274, 62d Congress, 2d Session, p. 275.

[6] H. Sinclair Putnam in Proceedings of the Conference of Governors, 1908, p. 297; M. O. Leighton of United States Geological Survey, Annals of the American Academy of Political and Social Science, May, 1909, p. 54.

the extent that the amount of water power which is yet undeveloped, but which could be economically developed at the present time, amounts, as shown above, to about twenty million horse-powers. As fuel grows scarcer and as the science of electrical transmission progresses, further water-powers, now merely potential, will be available for the market. It is computed that under average conditions about fifteen tons of coal are required to generate one horse-power a year.[7] The use, therefore, of the twenty million horse-powers of water power now unused but economically available, would reduce the annual coal consumption by approximately three hundred million tons; that is, by more than fifty per cent. Thus by the extended utilization of one source of energy, water power, two objects of conservation would be accomplished, — the utilization, without loss, of one natural resource, and the saving from loss of another.

CONSERVATION OF WATER-POWERS MEANS EXTENSION OF THEIR USE.

Herein lies the peculiar adaptability of the policy of conservation to the use of water-powers. The three natural resources referred to represent fairly three distinct classes, or kinds, differing in respect of their quality of persistence. The mineral supply, in this case the coal deposits, is limited by its fixed and approximately computable quantity. In the case of timber, while the present supply is limited, it, nevertheless, is naturally renewed. Indeed, the non-use of the quantity ripe for use is itself a waste; but, comparatively speaking, timber is a recurring, even if not a constant and undiminishing, natural resource. But water power is constant. The supply is not diminished by use, for in itself it consists in the development and use of two constant factors, (1) supply of water and (2) a head and fall, through which the weight of the water creates energy developable for practical use.

Every ton of coal used is forever lost as a source of energy. The use of every fifteen tons of coal means that the natural sources of energy have been forever diminished by an amount equivalent to the use of one horse-power for an entire year. To the extent that any quantity of coal is used up for energy before the time when its

[7] Senate Document 274, pp. 26, 32.

use is necessary, in place of an equal amount of energy from water power, such use constitutes a waste of energy. On the other hand, the non-use of any quantity of water power, through lack of development and of use of water-powers, the development of which is commercially feasible, means a waste of energy which can never be recouped. So far as such waste of water-power energy is accompanied by the further waste of coal energy, which the water-power energy might otherwise replace, there results a double and continuous loss or waste of the energy available from natural resources and, therefore, of these two natural resources themselves. The primary object of the conservation of natural resources, which is to preserve them from waste, is manifestly doubly opposed by any policy which defeats or postpones the development and utilization of water-power energy.

Because it is inexhaustible and because its use replaces that of another and exhaustible natural source of energy, water power is the most potent of all natural resources, as a subject and agency of conservation. In the case of a limited, exhaustible, and rapidly diminishing supply of a natural resource, such as that of coal deposits, the forces of conservation should be directed to the prevention of use, as far as consistently possible. But the correct view of conservation inevitably leads to the demand that, in the case of water-powers, there shall be encouraged and promoted the greatest and most immediate use possible.

What, then, should be the policy and attitude of our state and national legislatures and of the people as a whole with regard to the conservation of water-powers, which, as we have seen, means their utilization, immediately and universally, and to the greatest extent possible, consistent with the fundamental constitutional law governing the rights and obligations between the federal and state governments and also between the people at large, represented by these governments, and individuals?

The Government as Sovereign and as Proprietor.

As applied to water-powers, a policy of reservation is obviously repugnant to conservation, for the latter manifestly means immediate utilization to the greatest extent possible. Again, legislative measures, national and state, while directed to promote present

and general utilization, should, in their purpose and effect, be made consistent with the fundamental law of private property rights. They should also be in harmony with the established rights and authority of the federal and state governments. A default in either of these particulars signifies a misapprehension of the real meaning and purpose of conservation, and involves a departure from the principles of that wise and progressive policy. Any unnecessary obstacle set up against the ready development and use of water-powers indicates a policy of reservation instead of utilization. A disregard, moreover, of the rights of individuals by either the federal or state governments, or of the rights of states by the federal government, leads to an unwarranted encroachment, under the guise of serving a paramount public interest, upon the authority and rights of the states, or upon the property rights of individuals, and makes conservation a mere pretext for confiscation.

From the failure to recognize these principles of conservation peculiarly applicable to water-powers, have arisen many mistakes in legislation heretofore enacted ostensibly in the interests of conservation. Such legislation affects two classes of property, the one where the element of proprietorship in the government is absent, and where its only rights are those arising by virtue of its sovereign authority to regulate commerce; the other where the government, in addition to its limited rights as sovereign, holds the water-power lands and rights as proprietor. Obviously the rights, obligations and authority of a purely sovereign power of control must be distinguished from those where the *ius publicum* and the *ius privatum* are combined. To the latter class belongs the control by the federal government of water-powers which are part of the public domain; also of those appurtenant to lands and rights which are acquired, by purchase or expropriation, by a government, national or state, for a use authorized in the public interest. To the former class belongs the control of water-powers which under the established law, are a part of the riparian land, the title to which is vested in private ownership; also, as against the federal government, where the ownership or power of control is vested in the states.

With respect to these classes of power of control, let us examine the present legislative policy. First, as to water-powers on the public domain.

WATER-POWERS ON THE PUBLIC DOMAIN.

As to lands upon the public domain, the federal government is both sovereign and proprietor. The question of its control of water-powers, which are part of the public domain, is, therefore, one of policy rather than one of constitutional law. The present avowed policy, however, is one of delay, hindrance, and reservation rather than one of encouragement to use. The public domain is mostly confined to the far western states, where, particularly in the mountainous regions, large and valuable undeveloped water-powers have long lain dormant; but their development is now economically feasible for markets creating a demand. They are potentially the source of stupendous industrial growth. Water-power development, however, involves immense expense in construction and maintenance of water-power and electrical plants and of transmission lines. Large capital investment is necessary. Capital is furnished, as any other commodity, upon terms commensurate with the hazards of the enterprise, and with the degree of certainty of tenure and of the probability of the ultimate return of the actual investment with fair profits thereon. As the government owns the water-powers on the public domain, it is proper that a charge, fair under all the circumstances, should be reserved for the right to utilize them. But the uncertainty of tenure and the onerous conditions imposed in grants of water-power rights upon the public domain have prevented any considerable development. A company or an individual desiring to develop water power upon the public domain must first appropriate the water under the laws of the state where the power site is situated. This provision recognizes the laws of those states in which most of the public domain is situated, and where the common law of riparian rights has been replaced or modified by that of prior appropriation. It recognizes, also, the rule, established as to all states, that, as between the individual and the government, federal or state, the individual rights are established and enforced according to the property law of the state wherein the land is situated, subject always to the authority of the Congress to regulate commerce, that is, in the case of waterways, to regulate navigation.[8] Before development one must,

[8] Act of July 26, 1866, U. S. Rev. Stat., sec. 2339; Act of July 9, 1870, U. S. Rev. Stat., sec. 2340; Act of March 3, 1877 (Desert Land Act), 19 U. S. Stat. at Large,

upon application, obtain the permission of the Secretary of Agriculture or the Secretary of the Interior, to use such portion of the public domain as may be necessary for a dam, power plant, and transmission lines; and such permit is revocable at the will of such department and subject to such changes and conditions as it may, from time to time, see fit to impose. The land still remains subject to entry under the homestead or mining laws and such entry may effect a revocation of the permit. If the jurisdiction over the land in question is transferred from one department to another, the permit is thereby automatically revoked. There is no provision for uniform rules, to insure certainty or consistency in the privileges conferred or in the obligations imposed.[9] This policy of legislative discouragement evolved into an avowed legislative policy of complete reservation, when, in 1910, the Congress authorized the President, in his discretion, to withdraw from settlement, location, sale, or entry, any of the public lands and to reserve the same for water-power sites or other enumerated uses until such withdrawals or reservations should be revoked.[10] Under the authority thus granted there have been withdrawn from location or use most of the desirable water-power sites upon the public domain. The amount of water power now undeveloped and capable of development in the national forests is estimated at over thirteen million horse-powers, as against about three hundred thousand horse-powers now developed. This does not include a very large, but less proportionate, amount of undeveloped water power on other parts of the public domain.[11]

It is manifest that a proper conservation policy demands that all these water-powers be available for immediate use and that a definite, consistent policy be adopted with regard to their control. Safeguards may be provided against purely speculative entries and against monopoly. At the same time, the greatest encouragement should be given to capital for investment. The chances of any

377; St. Anthony Falls Water-Power Co. *v.* Water Commissioners, 168 U. S. 349, 365 (1897).

[9] Act of February 26, 1897, 29 U. S. Stat. at Large, 599; Act of June 4, 1897, 30 U. S. Stat. at Large, 34–36; Act of February 15, 1901, 31 U. S. Stat. at Large, 790; Act of February 1, 1905, 33 U. S. Stat. at Large, 628.

[10] Act of June 25, 1910, 36 U. S. Stat. at Large, 847.

[11] Report of Commissioner of Corporations on Water-Power Development in the United States, March 14, 1912, pp. 194–195.

automatic revocation of permits should be eliminated. The power of arbitrary revocation should not be reserved. If a time limit is fixed, it should be for a long period, not less than fifty years. But any fixed time limit, without provisions for renewal upon definite terms, is a great obstacle to investment. Investors are reasonably entitled to be assured of a return of their investment with an annual profit commensurate with the hazards incurred. If, at the end of a fixed period, they are to forfeit their plant, or be subject to a renewal of their permit upon terms not agreed upon in advance, or be compelled to turn over their plant upon the payment merely of its then cost of reproduction, their service charges must be increased so that at the expiration of the permit they shall have received from the consumers not only interest and profits, but also the entire amount originally invested in structures, renewals, and improvements. Assurances of continuity of tenure, either by provision for renewals of permits for definite terms or by perpetual permits, subject to specific rates for rentals or charges measured by the success of the enterprise as evidenced by profits, would establish a tangible and business-like basis for investment. A permit should be revocable only for cause and after an adjudication. Rates to consumers should be subject to the control of the various states in which the product is supplied, thus making the control of rates subject to the same rules as are applicable to other similar public-service enterprises.

These are simple problems and can be easily and wisely solved if they are approached in the true conservation spirit. The present obstacle to their solution is the too prevalent idea that proper regard for the interests of private investors is a heresy of conservation and that the reservation to the government of the very utmost possible, of profit and of advantage, is of the essence of conservation.

Water Power at Government Navigation Dams.

Under its constitutional power to regulate commerce the Congress has paramount control of navigation in the navigable streams and waters of the United States.[12] Under this power the federal

[12] Gibbons *v.* Ogden, 9 Wheat. (U. S.) 1 (1824); The Genesee Chief *v.* Fitzhugh, 12 How. (U. S.) 443 (1851).

government, with the authority of the Congress, has constructed and maintains on rivers, at various points in the United States, navigation dams with locks and power appliances necessary for their operation. For such purpose it sometimes purchases or expropriates the necessary riparian lands and rights, and thereby becomes the proprietor, not only of the structures and appurtenant appliances, but also of the riparian land and rights included in, or affected by, the structures and by their operation, and hence is owner of the water power developed at such a dam. It has no power or authority to construct or operate a dam for water-power purposes, except for its own direct use. The government could not, either as proprietor or sovereign, erect and operate a dam, primarily for water power, and sell or lease, either the structures and water-power rights or the power produced. Where, however, it owns water power created incidentally to its authorized navigation improvements, it may sell or lease the surplus power, not required for its own use, and upon such terms as it may choose to make with any purchaser or lessee. The right to make terms and conditions for such use of the water power does not rest upon the fact that the water power is incidental to a navigation improvement; neither does it rest upon the fact that the government has control of the river for the purposes of navigation. This right is based expressly upon the fact that the government by virtue of its acquirement of the riparian rights, holds a proprietary interest in the water power in question, and that, as such proprietor, it may deal as any holder of a proprietary interest.[13]

The federal government has a certain power, arising by virtue of its sovereign power under the commerce clause, of control over navigation. This sovereign power is limited. By virtue of that power alone it has no ownership or control over water-powers as such, whether they be developed at navigation dams or otherwise. It may acquire further rights, either of ownership or of control, by attaching to its sovereign right certain proprietary rights; and it is the extent of its acquirement of such proprietary rights which, mainly, determines the relations and obligations between the government and the riparian. In the foregoing I have assumed that when the government entered upon the construction of a naviga-

[13] Green Bay Co. *v.* The Patten Paper Co., 172 U. S. 58, 173 U. S. 179 (1899).

tion dam, it acquired, not only sufficient riparian land for its dam abutments and other rights within the bed, but also the riparian water-power rights affected by the dam; that is, that it became, by purchase or otherwise, through private or state grants, or both, proprietor of the water power itself. Such were the circumstances in the case of the Green Bay Co. *v.* Patten Paper Co.

To cite that case, however, as authority for the claim that, because the navigation dam has been constructed by the government under its constitutional power of control over navigation, it thereby acquires either ownership or control over all the water power developed at the navigation dam, is to lose sight of many obvious and controlling distinctions. It is not necessary here to decide the question, which is sometimes disputed, whether the government has the right to condemn, or even to acquire by purchase, any water-power rights beyond those which are reasonably necessary to enable it to construct and operate the navigation dam. That it may do so, at least to the extent required for navigation purposes, is manifest. That it has no ownership or control of any amount of water power beyond the quantity required for such navigation purposes, except through an acquirement for which compensation is made, is equally manifest. The mere fact that the surplus water power is developed by the navigation dam does not change the proprietary right to such water power from the riparian to the sovereign. The water power is not "created" by the dam. It was created by nature when the quantity of flow and the head and fall were made a natural incident to the riparian real estate. Its ownership in the riparian, established by nature, was confirmed by the law of the land which vested it in him as a property right *iure naturæ*. Its incidental development through a construction by one who is not its owner does not change its ownership, any more than would the fetching to market by one man of goods owned by another.

It is consistent with its constitutional power of navigation control, that the government should have or acquire the right to occupy the bed of the stream with its navigation dam, the right thereby to develop and use such an amount of water power as is necessary to operate the dam for navigation purposes, the right to raise and lower the waters in the pool above the dam in the operation of the locks, the right to acquire land for dam abutments, flowage and other necessary purposes, and that, to the extent reasonably necessary

for purely navigation purposes, it should assert and exercise these rights, so belonging to it or so acquired, as paramount to the rights of ownership or of use belonging to the riparian. But the reasonable necessity for navigation purposes marks the limit of the rights which the government has or can acquire against the will of the riparian, or as purely paramount rights.

We have here a surplus water power, developed incidentally to the navigation improvement, the government owning and controlling to the limit of navigation interest, the riparian owning the remaining rights. This is an obverse case to the development by the riparian of the water-power dam, under consent of the government acting in the interests of navigation; for in the latter case the navigation facilities are incidental to the water-power improvement. In both instances the question of the rights and obligations between the government and the riparian can be properly solved only by observing the distinctions arising from the sources of their respective rights. If it were physically feasible, as it might be in some cases, that the surplus water power could be utilized without the aid of the navigation dam, the riparian would have the right to enjoy the full beneficial use of such power, subject to the condition that he did not affect the flow at the navigation dam in such a way as to interfere with its operation for navigation. This might be done, for example, by constructing around the pool created by the navigation dam, or, if the contour of the river permitted, by constructing across the owner's land from a point above the pool to a point below the dam; but the expense of such development in most instances would be prohibitive. The possibility, however, illustrates the nature of the riparian right. On the other hand, to allow the riparian the free use of the development of his surplus water power afforded by the navigation dam itself, would give to him a financial advantage from the navigation development. If, therefore, he were to use his surplus water power under the navigation development, instead of by a more expensive independent water-power development, it would be proper, regardless of his technical legal rights, that he should pay to the government for such advantage an annual charge based upon the fair cost of construction and maintenance, not of the navigation dam and facilities as constructed by the government, but of such water-power dam as would have been reasonably necessary if the navigation improve-

ment had not been made. These should be matters of contract adjustment between the government and the riparian. What we are here interested in is the fact, that, without acquirement by the government with compensation, the surplus water power at navigation dams belongs to the riparian; meaning by surplus water power, all water power and all use of the water, not reasonably necessary to the operation of the dam as a navigation facility.

This distinction between the proprietary interest of the government and its right of control as sovereign under its constitutional power to regulate navigation, is an important one; for the refusal, by avowed advocates of conservation, to recognize this distinction, has occasioned disputes which have become the most serious obstruction to the utilization, and, therefore, to the conservation, of water-powers appurtenant to private riparian lands. This leads to a discussion of the legislative policy of conservation as applied to private riparian water-powers upon navigable streams.

Private Riparian Water-Powers.

Subject to the paramount control of the federal government to protect navigation, as already defined, the control of water-powers upon all streams, navigable or unnavigable, belongs to the states within which the water-powers are located. This applies to all the original states and to states since admitted to the union; and, as between the state and individuals, the proprietary interest and its character and extent are determined by the law of property rights as established in the respective states.[14] In accordance with these principles, so definitely fixed, the Congress has expressly recognized, by federal statutes, the controlling efficacy of local property laws and customs, with regard to water rights, existing in those states where the common law has been either repudiated or modified, and has, in statutory terms, confirmed the rule established by the decisions just cited from the federal Supreme Court.[15] Nevertheless, inconsistently, in the face of these admitted rules of state control

[14] St. Anthony Falls Water-Power Co. *v.* Water Commissioners, 168 U. S. 349, and cases cited in opinion.

[15] Act of July 26, 1866, 14 U. S. Stat. at Large, 253, and other federal statutes above cited; also Act of March 3, 1891 (Repeal of Timber Culture Laws), 26 U. S. Stat. at Large 1093.

for water-power purposes, the United States Forest Service, assuming to act under its authority for establishing rules, has indirectly encroached upon the power of the states to control watercourses, by establishing restrictive rules and regulations for such parts of the public domain as are essential for dam and reservoir sites, canals, transmission lines, and for similar uses, thus extending, indirectly, the policy, or lack of policy, of revocable permits and insecure tenure of investors, to the development of water-powers upon many navigable and unnavigable streams and watercourses, the control of which, for water-power purposes, belongs to the states.[16]

Accordingly, in order to determine the law of property rights of the individual as against the state, or of either or both as against the federal government, and, therefore, to determine the rule by which the federal government itself and its courts are bound, we have to resort to the law as established by the respective states. So it is that in Arizona, Colorado, Idaho, New Mexico, Nevada, Utah, and Wyoming the so-called "Colorado doctrine" governs, whereby the common law of riparian ownership and control of water-powers is repudiated and the law of control by the state prevails, state statutes allowing and regulating appropriation of waters for power and other private uses with preference in the order of actual appropriation.[17] In others of the far western states there prevails the "California doctrine," by which the common law of riparian rights governs, modified only by appropriation rights vested before the riparian lands passed to private ownership. This is the rule in California, Kansas, Montana, North Dakota, Oklahoma, South Dakota, and other states.[18]

In the states lying east of or bordering upon the Mississippi River, the common-law rule of riparian rights generally prevails. In these states, to the extent that the common law of riparian rights has been retained, the right to the beneficial use of the water-power appurtenant to riparian land is a part and parcel of the land and belongs to the riparian owner. The state has no right of ownership or control in a proprietary sense. Its rights are confined to that of

[16] See Forest Service "Use Book" issued December 28, 1910.

[17] Land & Canal Co. *v.* Ditch Co., 18 Colo. 1, 30 Pac. 1032 (1892); Kansas *v.* Colorado, 206 U. S. 46 (1907); Boquillas Co. *v.* Curtis, 213 U. S. 339 (1909); United States *v.* Rio Grande Co., 174 U. S. 690, 706 (1899).

[18] Lux *v.* Haggin, 69 Cal. 255, 10 Pac. 674 (1886); Bigelow *v.* Draper, 6 N. D. 152, 69 N. W. 570 (1896); Sturr *v.* Beck, 6 Dak. 71, 133 U. S. 541 (1890).

a sovereign power of control for the public use of navigation. All proprietary interests belong to the riparian, and extend to all beneficial uses of the water-power including the revenues therefrom.[19] The distinction as to navigable streams, that in some states the riparian title extends only to high-water mark with the limited sovereign title in the bed and waters, and that in other states the riparian title extends to the middle of the stream, subject to the sovereign control for navigation, is, for practical purposes, merely speculative.[20] The rule is the same whether the stream be intrastate, interstate, or an international boundary.[21]

These rights, reserved to and established in the states, and these property rights of beneficial use, fixed by the law of the states in the riparian, are subject only to the paramount control of the federal government for the definite and specific purpose of protecting navigation. The authority of the Congress is limited to the prevention of any unreasonable interference with navigation.[22] Although the interests of navigation are paramount, the sovereign right of the government, national or state, to control or protect for this or other public use, while a conflicting interest, is not inconsistent with the exercise of the private right. Each must have regard for the other, but the private right persists up to the point where its exercise becomes an unreasonable interference with the public right. Both rights are limited, but the exercise of the limited public right cannot be used as a means of extinguishing or appropriating the private right.[23]

Government Control of Private Water-Power Dams.

With the object of protecting highway streams from unreasonable interference with navigation by private structures, including water-

[19] St. Anthony Falls Water-Power Co. *v.* Water Commissioners, 168 U. S. 358, citing the property law of Minnesota which is substantially that of all riparian-right states.

[20] Union Depot Co. *v.* Brunswick, 31 Minn. 297, 17 N. W. 626 (1883); Lamprey *v.* State, 52 Minn. 181, 53 N. W. 1139 (1893); Hobart *v.* Hall, 174 Fed. 433, aff'd 186 Fed. 426 (1911).

[21] United States *v.* Chandler-Dunbar Co., 209 U. S. 447 (1908); Niagara County *v.* College Heights Co., 111 N. Y. App. Div. 770, 98 N. Y. Supp. 4 (1906); People *v.* Smith, 70 N. Y. App. Div. 543, 75 N. Y. Supp. 1100 (1902); aff'd 175 N. Y. 469, 67 N. E. 1088 (1903).

[22] Union Bridge Co. *v.* United States, 204 U. S. 364, 399 (1907).

[23] State *ex rel.* Wausau Street Ry. Co. *v.* Bancroft, 148 Wis. 124, 134 N. W. 330 (1912); Crookston Co. *v.* Sprague, 91 Minn. 461, 98 N. W. 347 (1904). On this and other points see "Limitations of Federal Control of Water-Powers" by Rome G. Brown, Senate Document No. 721, 62d Congress, 2d Session.

power dams, the Congress has provided that such structures are prohibited except with the consent of the Congress and that the plans shall be subject to the approval of the Secretary of War and of the Chief of Engineers.[24] The influence of one view of the policy of conservation is shown by later legislation compelling, at the expense of private owners, the construction and maintenance in water-power dams of navigation locks and the furnishing of power to operate the same, and imposing charges out of revenues from the water-power, to be used to promote navigation in other parts of the stream; also limiting the period of federal consent to fifty years, without any provisions for renewal or for compensation, at the expiration of that period, for the cost or value of structures.[25] As late as 1910 the National Waterways Commission, referring to the attempt of the federal government to collect tolls from the revenues of the private water-power owner, stated that it was without authority, and that such tolls, if imposed, could not be collected, because the federal government has no proprietary interest and no right arbitrarily to grant or withhold consent, and that such tolls could not be levied on the theory of a tax, because they discriminated against future developments in favor of those already made.[26] This was after a most thorough examination of the practical and legal questions involved, both in Congress and at special hearings before the commission. Yet, in March, 1912, the same commission, in its final report, urges complete federal control, under the commerce clause, of all hydro-electric plants upon all streams and in all states, and that, until such control be exercised, charges be made in favor of the government out of the revenues of the private water-powers in order to create a fund for the general purposes of navigation improvement.[27] An attempt is now being made in the Congress to insert in the so-called Connecticut River Bill a provision for such revenue charges, and the chief supporter of this proposition is the Chairman of the National Waterways

[24] Act of September 19, 1890, 20 U. S. Stat. at Large, 426; Act of July 13, 1892, 27 U. S. Stat. at Large, 88; Act of March 3, 1899, 30 U. S. Stat. at Large, 1121.

[25] Act of June 21, 1906, 34 U. S. Stat. at Large, 386; Act of June 23, 1910, 36 U. S. Stat. at Large, 593.

[26] Report National Waterways Commission, Senate Document No. 469, 62d Congress, 2d Session, p. 86.

[27] Report National Waterways Commission, Senate Document No. 469, 62d Congress, 2d Session, p. 61.

Commission.[28] The same policy was also supported by Secretary of War Stimson, Secretary of the Interior Fisher, and by President Taft.[29]

The dispute over this question, which has been carried on in the Congress for several years, and which is now at its height, has been, and threatens to continue, a serious obstacle to private water-power development. It is a dispute between ultra-conservationists, upon the one side, and the more conservative element, upon the other. The source of the difficulty is obviously the growing tendency to depart from the practical and fundamental principle of conservation of water-powers, which is to promote their immediate and general utilization, and to view private water-powers primarily as a possible source of direct revenue for public use.

It is in this respect that the drastic innovations of the Dam Acts of 1906 and 1910 have discouraged water-power development. They put upon the owner the burden of a large initial expense in favor of the government, and limit the right, acquired under consent of the Congress, to a period of fifty years, without any provision for adjustment between the owner and the government at the end of that period. And the power is reserved to revoke the permit at any time, upon paying to the owner the then reasonable value of the physical plant.[30] Such provisions are naturally obstacles to improvement; and the National Waterways Commission, in its final report, says, with reference to them, that

"experience has shown that these provisions are not well suited to encourage development of water power or to protect the public interest. Nothing is more discouraging to the investor of capital than uncertainty. . . . The necessity of amortizing the plant, in addition to all other costs of rendering the services, will inevitably result in an increased charge to the consumer, which amounts to a tax of doubtful equity on the local

[28] See majority and minority reports United States Senate Commerce Committee, No. 1131, 62d Congress, 3d Session. See "Who Owns the Water-Powers" by Rome G. Brown, Case and Comment, March, 1913.

[29] See Report Commerce Committee on the Coosa River Bill, S. 7243, 62d Congress, 2d Session; veto message of the President on the same bill; but compare opinion of Secretary of War Taft in Des Plaines River matter, February 23, 1907; Report House Committee on Interstate and Foreign Commerce, February 25, 1909, 60th Congress, 2d Session.

[30] Act of June 21, 1906, 34 U. S. Stat. at Large, 386; Act of June 23, 1910, 36 U. S. Stat. at Large, 593.

community for the benefit of the general government. This unnecessary burden could be avoided if Congress would enact legislation providing for a more equitable form of franchise." [31]

It is apparent that consent should be without limit of time, for the interests of navigation and of the public, so far as any public right of control over the water-power exists, are preserved by the other general provisions of these acts.

Under the discussion of government navigation dams above, the limitations between private and federal control of the water-powers in navigable streams have been suggested. In these questions there are three classes of disputants, representing two extremes and a conservative mean. One extreme claim is that, both at navigation dams and at private water-power dams, the federal government has a right to assert and should assert not only control but even ownership, of all the water-power developed; that in the case of navigation dams no rights of the riparian should be recognized; and that in the case of water-power dams built by the riparian only such rights of beneficial use should be allowed to the riparian as will fairly compensate him for the expense which he has incurred in the improvement, — a concession by the government in consideration that the government without expense has obtained, as incidental to the water-power development, certain navigation facilities. The other extreme is the claim that the riparian owns everything and that the government should receive no facilities or advantage from the use of the bed, or of the real estate or of water-power rights, whether for navigation purposes or otherwise, except upon full compensation to the riparian.

Neither of these views is logical or consistent with the proper view of the constitutional rights and obligations of the parties concerned. It is practically impossible to fix in all cases an adjustment precisely in accordance with the strict legal rights. A proper governmental policy can never be adopted, however, without rejecting both these extreme views by a recognition of the general principles governing the constitutional powers of the government upon the one hand and the property rights of the riparian upon the other.

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[31] Report National Waterways Commission, Senate Document 469, 62d Congress, 2d Session, p. 54.

It is hopeless to discuss these questions with those legislators who refuse to recognize any distinction between the constitutional *right* of the Congress, as fixed by a proper regard for the limitations of constitutional authority, and the *power* of the Congress to do this or that thing, measuring such power only by the possible inability of those against whom it is exerted to protect themselves. There is a vast difference between mere physical or brute power and a right based upon authority. It is true that under its authority to protect navigation the Congress may prohibit, as it does, the construction of private water-power dams in navigable streams, except with congressional consent. But its right to reserve and exercise such power of consent extends no further than the general right to which it is an incident, that is, the right to protect navigation. To the extent necessary to protect navigation, and to that extent only, is the right and power of consent exercised with authority. It is useless to argue with a legislator who says that, having the right of prohibition except upon consent, the Congress has, therefore, not only the power, but the constitutional right, arbitrarily to give or to withhold the consent, and that having such arbitrary power, it has not only the power but also the right to attach any condition, of whatever nature or for whatever purpose it may choose, to the granting of the consent.

I am here discussing the question of a wise constitutional policy, assuming the exercise by the Congress only of rights and powers authorized by the Constitution, and assuming that every member of the Congress has regard for his oath to support that Constitution. It is not an answer, therefore, to any of the propositions which are here suggested, to ask whether and how, under the Constitution, a private riparian owner could prevent drastic, arbitrary and unconstitutional legislation, either by mandamus against the Congress or against any of the executive departments whose action should exceed the rights expressly limited by the Constitution. It is upon this asserted unlimited power of the Congress, arbitrarily to withhold consent to the building of water-power dams upon navigable streams, as distinguished from its really authorized, constitutional and limited right, that has been based the attempt to impose drastic and confiscatory burdens upon the riparian in connection with legislation providing for private water-power dams. Among such attempted unconstitutional burdens are those of tolls or

charges from the proceeds of the water-power for revenue purposes.

Charges for revenue, to be paid out of the proceeds of the water-power, either as already provided in federal statutes or as proposed to be extended, should be avoided, not only on the ground of lack of constitutional authority to impose and enforce such charges, but also because the exaction of such tribute is against a wise policy. Under the principles excluding any proprietary right in the federal government, already shown, and fixing the proprietary interest in the riparian owner, it follows that the levy of tolls by the federal government is unjustified; for after the private riparian owner has been burdened with the expense of locks and of their operation, and has conformed his works, at his own expense, to present and future navigation purposes, and is obligated to operate them subject to the uses for navigation, then all the remaining beneficial uses belong to him. If the property law peculiar to any particular state limits the common-law riparian right so as to give to the public any right of advantage further than it would have under the strictly common-law rule, then such advantage, so far as the water-power itself is concerned, belongs to, and is subject to the control only of, the state government. The exaction of tolls or charges, therefore, beyond the limits indicated, is an encroachment upon the rights of the states or of the individual riparian, or of both. The legal limitation of the power to levy charges is that governing the imposition of a license fee usually arising from the power of regulation, which, in this case, is a power, not of exaction of revenue or of prohibition, but one purely of regulation for a specified purpose. Such fee may be based upon the actual expense occasioned to the government in supervising and in carrying out the requirements for the issuance of the license.[32]

But, besides being without authority, the exaction of such tolls operates as a discouragement to development. This results, not merely from the fact itself of toll charges, but also from the manner

[32] It may include not only the expense of issuing the license, "but also the additional labor of officers and other expenses imposed by the business for which the license is issued, but nothing beyond this. . . . The amount of the license fee or charge is to be considered in determining whether the exaction is not really one of revenue or prohibition instead of regulation." City of Ottumwa *v.* Zekind, 95 Ia. 622 (1895); Savage *v.* Jones, 225 U. S. 501 (1912). See also State *ex rel.* Wausau Ry. Co. *v.* Bancroft, *supra*, declaring as confiscatory tolls by the state under the guise of regulation.

in which they are imposed. The fact of their imposition and their amount are left uncertain and changeable at any time at the will of him who happens to be the head of the War Department. The manufacture and distribution of energy from water-power are mostly intrastate, and the matter of regulation of rates is, therefore, primarily a matter of state regulation. For this purpose most states have commissions, affording means of proper adjudication, consistent with local conditions. Moreover, any charge for revenue to the federal government means increased expense of operation which must be taken into consideration by any tribunal fixing rates to the consumer. Federal tolls, even though used for the general improvement of navigation, impose an unequal burden upon comparatively isolated localities for a general public benefit; and at the same time that they thus diminish the advantage to the locality in which the water-power is situated, they encroach upon the right of control by the local state authorities.

This dispute, which is now waging in the Congress, is important here because the inconsistent and uncertain provisions heretofore made and the failure to adopt a definite, business-like policy have been and are antagonistic to the cause of conservation, which, in the case of water-powers, as we have seen, is to promote rapid and wide utilization. Projected developments have been abandoned or postponed, because investors halt before the burdens, the uncertainties and unnecessary hazards placed upon such investments. Besides their adaptability to the manufacture of electrical energy for general distribution, water-powers are peculiarly fitted for the manufacture of certain products. In some instances large industries have been turned from this country to others, for the very reason that the attitude of the government toward private water-power development made investments here insecure.[33] There has been for a long time at Washington a sort of deadlock between those representing the two sides of this question. The majority in the Congress oppose the levy of tolls by the federal government as repugnant to constitutional law and as against a wise policy;

[33] "Water Power in the United States" by M. O. Leighton, Chief Hydrographer of the Geological Survey, in Annals of the American Academy of Political and Social Science, May, 1909; Report by Senator Bankhead, from Committee on Commerce accompanying S. 7343, the bill for dam across Coosa River, 62d Congress, 2d Session.

while the executive departments of government generally have been in favor of such tolls.[34] The result has been the retardation of water-power development upon navigable streams.

The usual arguments against "big business" and against monopolies have been urged in favor, not only of general federal control, but also of the exaction of tolls. The pseudo-conservationist assumes that water-power is a comparatively inexpensive source of energy and that, therefore, investors in water-power developments can compete with steam power, although subject to the levying of large and uncertain tributes, not only out of their original investment, but also out of their income. As a matter of fact, the development of a hydro-electric plant requires a capital investment per horse-power produced so great that, as against the original investment in a steam plant together with the cost of fuel, it is only in exceptional cases that even without extraordinary burdens the water-power plant is the more economical. Moreover, the hazards of the investment are greater in the case of water-powers, and the most economical development of water-power requires an auxiliary steam plant to supplement the water-power at lower stages of flow. Water-power development requires big capital and means big business. As to its regulation and control, including the matter of rates, it is subject to the same laws and tribunals as other similar public-service enterprises. The exaction of tolls has no anti-monopoly effect, except as it prevents investments altogether. On the other hand, it creates an extra tax or charge upon the consumer, to the extent that it increases the cost of operation.

[34] See report of sub-committee on dams and water-powers to Committee on Interstate and Foreign Commerce, House of Representatives, 60th Congress, 2d Session, February 25, 1909, showing President's veto of Rainy River Dam Bill, House Committee Report on same, President's veto of James River Dam Bill, and other documents; Report Senate Committee on Commerce on James River Dam Bill, being Report No. 585, 60th Congress, 1st Session; Report of Senate Committee on Commerce on Senate Bill 7343, the Coosa River Dam Bill, 62d Congress, 2d Session; President's veto message of Coosa River Dam Bill, Senate Document 949, 62d Congress, 2d Session; Majority and minority reports of Senate Commerce Committee, 62d Congress, 3d Session, on Senate Bill 8033, the Connecticut River Bill; also debates in the United States Senate, Congressional Record, February, 1913, on Connecticut River Bill. The President, Secretary of War, and Secretary of the Interior favored the inclusion of toll charges in the Connecticut River Bill; but they were eliminated from the bill by vote of 53 to 29, and the bill passed the Senate as so amended by a vote of 74 to 12. See Congressional Record of February 17, 1913.

The appropriation by the government of a portion of the proceeds belonging to the riparian out of the beneficial use of his water-power has, indeed, a tendency to create and to promote water-power monopoly. Since the dispute in the Congress over these questions was precipitated about six years ago, water-power development upon navigable streams in this country, except those constructed under prior acts of the Congress, has been comparatively at a standstill. Water-power development has since been confined mostly to the small streams where congressional consent was not required. Millions of capital have been ready and are still ready and anxious for investment, if fair and safe provisions may be obtained. In the meantime enterprises under previous legislation, forever free from special burdens, are monopolizing the water-power markets, in which the supply is thus artificially limited. Thus by discouraging development of water-power commercially feasible, as well as by exacting charges which new enterprises might prefer to bear rather than to be deprived of the necessary legislative consent, a monopolistic advantage is given to those who have already developed, as against those who propose, future developments. In the meantime the large undeveloped water-powers of the country are going to waste and conservation, in its own name, is defeating itself.

Federal Obstacles to Conservation.

From the foregoing it is apparent that the affirmative policy of the Congress, so far as formulated, in respect to water-powers, is already too much one of reservation, or of hindrance to development. It is antagonistic to the utilization of this inexhaustible source of energy, and, therefore, an obstacle to conservation. The failure on the part of the Congress to establish a definite, consistent, and business-like policy is an additional obstacle. The difficulties are further increased by the attitude of those who insist, under the guise of conserving natural resources, upon using the water-powers as a means of revenue to the federal government, instead of regarding them as an economical and practical means of promoting the industrial developments of the localities in which they are situated. Indeed, in some instances where the question of federal revenue is not involved, there seems to be a disposition to assert the right of control merely for the sake of emphasizing

the power of the federal government as against the rights of the respective states and of their citizens.

In one instance even treaty provisions are disregarded. The United States and Great Britain, in 1910, ratified a treaty between the two nations by which the diversions for power at Niagara Falls were expressly limited to specific quantities for each side of the international boundary.[35] The amounts of diversion allowed were fixed from the computations of the United States engineers and other experts as being neither a hindrance to navigation nor to the scenic beauty of the Falls. Pending the negotiations for the treaty, and as a tentative arrangement, a statute was passed limiting the amounts of diversion upon this side of the river to amounts less than those afterwards fixed by the treaty and restricting importation to this side of power from the Canadian side.[36] Since the ratification of the treaty, several bills have been presented to carry out its object and terms, but for successive sessions such bills have been opposed by those assuming to act in the interests of conservation, so that the restrictions and limitations existing before the treaty have been continued in force.

The treaty expressly limited the diversion upon the American side to less than thirty-six per cent of the total amount of diversion allowed upon both sides, the total amount being fixed below the amount which would affect either navigation or scenic beauty or any public interest. That the diversions could not affect navigation in the slightest degree is apparent and is conceded by all engineers. The only basis for federal interference is therefore lacking. However, under an imaginary constitutional power in the Congress to protect scenic beauty, the Burton Act of 1906 was passed pending the treaty negotiations. A dozen years before, in accordance with their property rights, arising from riparian holdings and legislative grants from the state of New York, two companies had invested millions of dollars in the construction of plants, upon the American side, requiring for their operation at full capacity diversions from the falls of amounts of water not exceeding the amounts afterwards fixed by the treaty for the American side. The conser-

[35] Treaty between United States and Great Britain as to boundary waters between United States and Canada, proclaimed May 13, 1910, Treaty Series 548.

[36] Act of June 29, 1906, and joint resolution of March 3, 1909, being House Joint Resolution No. 262.

vation of scenic beauty was thus assured by the treaty provisions and at the same time interference with navigation was prevented, for the treaty amounts were based upon careful scientific investigation. It is manifest that, especially after the treaty, the Congress had no constitutional right to limit directly or indirectly diversions upon either side, — at least, not to any amounts below those fixed by the treaty. Diversions beyond the treaty limits were, by the treaty, discouraged and, in fact, prevented. The treaty contemplated unrestricted rights of importation.

None of the American investors have ever asked Congress for permission to divert a single cubic foot of water beyond the limits expressly fixed by the treaty; but have confined their requests to have the statutory authority for permits extended to the limits fixed by the treaty. At the same time, Canadian investors have asked for permission to import to this side the electrical energy manufactured from the water-power that they develop within the limits fixed by the treaty. Nevertheless, these requests, which are consistent with and promotive of the true policy of conservation, whether it be viewed as a conservation of power or of scenic beauty, have been vigorously opposed by certain self-styled "defenders" of Niagara, who misrepresent to the public the nature of the requests made by the American investors at Niagara and distort those reasonable requests into demands for unlimited permits for diversion. Those investors are heralded as assailants of the beautiful Niagara. Their modest prayer for an observation of the limited treaty provisions is heralded as a wholesale "attack" which threatens the very "life of the falls" and as an attempt to "cut the throat of beauty for gold." [37] It has been demonstrated that whatever unwatering of the crest of the falls has occurred in past years has been due entirely to the natural gradual recession of the apex of the Horseshoe falls, and is not due at all to any water-power diversions. In fact, the extra amount of diversion which is asked, and which is allowed by the treaty, upon the American side, over the amounts now allowed by continuing in force the original statute enacted as a *modus vivendi* pending the negotiations of the

[37] See "The Defender of Niagara" in Cosmopolitan Magazine, April, 1913. For similar, prejudiced and grossly erroneous views of the Niagara question see also "An Expensive Experiment" by R. P. Bolton, The Baker & Taylor Co., New York, 1913; and the "Outlook," March 29, 1913.

treaty, is only 4400 cubic feet a second, or less than eight per cent of the total amount fixed by the treaty and less than two per cent of the total ordinary flow over the falls, which amount has been demonstrated to be utterly inappreciable so far as it could possibly affect either scenic beauty or any public interest.[38]

The result has been the prevention of further development of industries on this side of the river, where there is a demand for immediate use of all the electrical energy that could be produced on the American side and of all that could be imported from the Canadian side; at the same time there is a forced and steadily increasing industrial development upon the Canadian side, where the use of the falls for power is limited only by the terms of the treaty. As fast as the electrical energy manufactured from the water-power allowed to the Canadian side is taken up there, the amount which can ever be imported to this country is permanently decreased. The extra amount allowed by the treaty for use upon this side over the limit retained by federal legislation, is still unutilized. Thus, in the name of conservation, industrial growth and all other advantages of water-power development and use are promoted by the United States Congress upon the Canadian side at the same time that they are retarded upon the American side. A more unreasonable and suicidal thwarting of the true policy of conservation could not be devised.

Conservation under State Legislation.

Some well-meaning friends of conservation seem to be obsessed with the idea that ownership and control by the government, federal or state, of water-powers must be extended to the utmost limits, and that constitutional prohibitions may be justifiably disregarded or evaded in so far as they stand in the way of carrying

[38] See Report of Hearings before House Committee on Foreign Affairs, January 16, 1912, and following days, on House bills, "to give effect to the fifth article of treaty between the United States and Great Britain, signed January 11, 1909"; also report of hearings before House Committee on Rivers and Harbors, January, 1911, on the same subject; also Report of Hearings before House Committee on Rivers and Harbors, April, 1906, on the Burton Act; also report on "Water-Powers of Canada," published by Commission of Conservation of Canada, September, 1911; also see Reports No. 1488, House Committee on Foreign Affairs, February 8 and February 25, 1913, 62d Congress, 3d Session, majority and minority reports on H. R. 28674.

out this idea. It is the blind adherence to this unlawful and unwise policy which has the greatest effect in maintaining a barrier to what is really the conservation of water-powers, because it discourages and obstructs proper and constitutional legislation for the promotion of water-power development. That this is true with respect to federal legislation has been shown. But the same fallacy prevails among many conservationists with respect to state legislation. The theory is too prevalent that, because the federal Supreme Court has fixed the state law as the law of property rights with regard to water-powers, therefore the power and authority of the state over water-powers are unlimited. This idea disregards the fundamental proposition of constitutional law that, where vested property rights are established by the common law of a state, then such rights cannot be diminished or destroyed except by due process of law; and that, therefore, they cannot be taken away by any fiat of the voters whether in the form of a state statute or in the form of an amendment to the state constitution. The law of the state by which property rights are determined is the state common law as adjudicated by the decisions of the highest court of the state.[39] The rule of property right so fixed is binding upon all courts, including the federal courts, so far as concerns property rights within the state in question. The fact that in some states a more extended rule of ownership and control by the state has been established than in other states as the law of property rights, or that the rule is radically different in different states, does not justify the conclusion that any state may arbitrarily change the rule of property rights from that which has once been established. The fact that one rule in one state has been established with a better regard for public policy, than the rule established in another state, or that one is more promotive of general conservation than another, does not permit an arbitrary change of property law in a state where the rule may be less favorable to general public advantage. As to each state we have to take the rule of property rights as we there find it, and, having regard for that rule, work out, as far as possible, consistently with the law, the objects of conservation.

[39] St. Anthony Falls Water-Power Co. *v.* Water Commissioners, 168 U. S. 349, 365, 371, and cases cited in the opinion; Fallbrook Irrigation District *v.* Bradley, 164 U. S. 112, 159 (1896); Kansas *v.* Colorado, 206 U. S. 46, 94 (1907); United States *v.* Rio Grande Co., 174 U. S. 690, 702 (1899).

The too prevalent disregard of these distinctions, and persistent attempts, regardless of constitutional limitations, to thrust aside these obstacles presented by the law, have tended to discredit and to retard the cause of conservation.

Attempt at conservation by constitutional fiat is illustrated by the adoption, in 1889, in the state of North Dakota, of a constitutional amendment providing that "all flowing streams and natural watercourses shall forever remain the property of the State for mining, irrigation, and manufacturing purposes." [40] The decisions of the state supreme court had, as against subsequent appropriation, already established the law of riparian rights as the property law of that state.[41] In a later case this constitutional provision was invoked as abolishing that law of riparian rights; but the state supreme court held that this section of the constitution would itself be unconstitutional if it appeared that the property rights, as fixed by the previous decisions of the state court, were thereby to be invaded.[42] Similar attempts, all of them unsuccessful, have been made to change a state common law of riparian rights to one of state control and ownership of water-powers. Such was the attempt made in the Minnesota legislature of 1911 when the Wisconsin water-power statute of that year was urged for passage. Although it passed the house it was stopped in the senate upon the opinion of the attorney-general that it was confiscatory and unconstitutional.

The same year, however, a statute was passed in Wisconsin attempting to change the law of riparian rights established in that state to the law of state ownership and control of water-powers.[43] This legislation proceeded on the theory, declared in its preamble, that all the beneficial use and natural energy of the water of navigable streams in that state belong to the state in trust for all the people and are subject to the control of the state for the public good. Beside other drastic provisions, it attempted to levy upon the private owner in behalf of the state tolls at varying rates per horse-power. The supreme court of the state unanimously declared the statute in conflict with the established property law, and

[40] N. D. Const., Art. XVII, sec. 210.
[41] Sturr *v.* Beck, 6 Dak. 71, 133 U. S. 541 (1890).
[42] Bigelow *v.* Draper, 6 N. D. 152, 69 N. W. 570 (1896).
[43] Wis. Laws, 1911, c. 652.

confiscatory and unconstitutional.[44] The further significance of this statute as an alleged conservation measure is shown by the fact that the passage of such a statute was made the chief feature of the political campaign throughout the state prior to the election of the legislature and that it was urged to the voters of the state and afterwards to the legislature as a progressive conservation measure. However, from the time the agitation started until the decision of the supreme court, invalidating the statute, was filed, water-power development in the state of Wisconsin was stopped. Indeed, despite the action of the state supreme court, propositions for water-power development in that state are still regarded by investors as unsafe. They prefer investments in localities where there has been a different demonstration as to the prevailing idea of what constitutes conservation.

Conservation of water-powers, whether through national or state legislation, will never be realized, so long as the fallacy persists that the interests of conservation and the interests of water-power owners are at war with each other. This fallacy has been the cause of most of the erroneous and futile attempts by legislatures to solve, with respect of water-powers, the problem of their conservation. This fallacy itself has sprung from a failure on the part of both classes of interests to appreciate the underlying principles involved. Advocacy of hasty and extreme measures, inimical to the property rights of private owners and rendering hazardous the necessary investments of capital, has tended to create a hostile attitude on the part of private interests toward the carrying out of a conservation policy. This hostility, in its turn, incites a further spirit of antagonism on the part of the forces of conservation. The questions of conservation become confounded with questions concerning monopoly, competition, and the relations between the producer and the consumer. But those representing the two classes of interests involved, those representing the public and those representing investors, are now realizing, more than ever before, the fact that real advantage to any locality or to the public at large lies upon the same lines as real advantage to the holders of investments in water-power development. Both should recognize the feasibility

[44] State *ex rel.* Wausau St. Ry. Co. *v.* Bancroft, 148 Wis. 124, 134 N. W. 330 (1912).

of getting together on some basis which will, at the same time that it admits of adequate protection to the public, also provide an attractive field for investment. Public-utility companies should become convinced that a proper and fair restriction and regulation in the operation of their properties are reasonable and necessary, and eventually promotive of their own best interests. They should be convinced, as they are more and more, that reasonable concessions, even if beyond the limit of their exact legal obligations, assure to them a readiness on the part of legislative bodies to yield also something in return, including a more certain tenure and safer and more comprehensive protection, through legislation, of the beneficial use belonging to them as proprietors.[45]

Both the public and the private interests involved require water-power utilization and further opportunities and facilities for utilization. The fact should be recognized in legislatures, national and state, that the questions of the control of rates, of proper regulation and of prevention of monopoly, can be adequately solved without being confused with legislation enacted for the purpose of encouraging and promoting water-power development. It should be recognized that resort need not be had to specious pretexts to strain or evade the law governing the rights of states or of individuals, and that the refraining from undue and illegal advantage and privilege, by either the government or the individual, is not inconsistent with a proper conservation policy.

Adequate water-power development and its economical operation mean, to some extent at least, combination and consolidation. They involve large capital investments. But they do not, for that reason, mean, as is too often assumed, either a menace to the general public interest or a menace to the consumer himself. It is through private ownership and control of water-powers that the objects of conservation can best be accomplished. Investment of private capital in their development should be encouraged. The policy of a paternalistic or socialistic control by the government, in order to extract directly from the proceeds of water-power developments revenues or charges for the benefit of the people as a whole, is antagonistic to the purposes of conservation. Such a policy is

[45] See "The Right Use of the Nation's Water Power" by M. O. Leighton, Chief Hydrographer of the United States Geological Survey, Leslie's Weekly, February 20, 1913.

founded upon an unreasonable misapprehension of the significance of private ownership and of large investments. Mr. Justice Holmes recently said: [46]

"We are apt to think of ownership as a terminus, not as a gateway — and not to realize that, except the tax levied for personal consumption, large ownership means investment, and investment means the direction of labor toward the production of the greatest returns, returns that so far as they are great show by that very fact that they are consumed by the many, not alone by the few. If I might ride a hobby for an instant, I should say we need to think things instead of words — to drop ownership, money, etc., and to think of the stream of products; of wheat and cloth and railway travel. When we do, it is obvious that the many consume them; that they now as truly have substantially all there is, as if the title were in the United States; that the great body of property is socially administered now, and that the function of private ownership is to divine in advance the equilibrium of social desires — which socialism equally would have to divine, but which, under the illusion of self-seeking, is more poignantly and shrewdly foreseen."

The policy of conservation, as applied to water-powers, should be recognized as the policy of promoting, as rapidly and as extensively as possible, within the law, the utilization of the perpetual and inexhaustible resources afforded by every water-power in this country, the development of which is, or can be made, economically feasible.

Rome G. Brown.

MINNEAPOLIS, MINNESOTA.

[46] Speech of Mr. Justice Holmes at Dinner of the Harvard Law Association of New York, February 15, 1913, Senate Document No. 1106, 62d Congress, 3d Session.